No. 88-2018

In The

Supreme Court of the United States

October Term 1989

STATE OF ILLINOIS,

Petitioner,

vs.

EDWARD RODRIGUEZ,

Respondent.

On Writ Of Certiorari To The Appellate Court Of Illinois, First District

BRIEF FOR THE RESPONDENT

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BRIEF FOR THE RESPONDENT

CONSTITUTIONAL PROVISIONS

United States Constitution amendment IV.;

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Article I § 6 of the 1970 Illinois Constitution:

Searches, Seizures, Privacy and Interceptions

The people shall have the right to be secure in their persons, houses, papers and other possessions against unreasonable searches, seizures, invasions of privacy or interceptions of communications by eavesdropping devices or other means. No warrant shall issue without probable cause, supported by affidavit particularly describing the place to be searched and the persons or things to be seized.

STATUTES

Ch. 38, Illinois Revised Statutes, § 107-11 (1987):

107-11. When summons may be issued

§ 107-11. When summons may be issued. (a) When authorized to issue a warrant of arrest a court may in lieu thereof issue a summons.

(b) The summons shall:

(1) Be in writing;

(2) State the name of the person summoned and his address, if known;

(3) Set forth the nature of the offense;

(4) State the date when issued and the municipality or county where issued;

(5) By signed by the judge of the court with the title of his office; and

(6) Command the person to appear before a court at a certain time and place.

(c) The summons may be served in the same manner as the summons in a civil action, except that police officers may serve summons for violations of ordinances governing the parking or standing of vehicles occurring within their municipalities.

Ch. 38, Illinois Revised Statutes, § 107-12 (1984):

107-12. Notice to appear

§ 107-12. Notice to appear. (a) Whenever a peace officer is authorized to arrest a person without a warrant he may instead issue to such person a notice to appear.

(b) The notice shall:

(1) Be in writing;

(2) State the name of the person and his address, if known;

(3) Set forth the nature of the offense;

(4) Be signed by the officer issuing the notice; and

(5) Request the person to appear before a court at a certain time and place.

(c) Upon failure of the person to appear a summons or warrant of arrest may issue.

(d) In any case in which a person is arrested for a Class C misdemeanor or a petty offense and remanded to the sheriff other than pursuant to a court order, the sheriff may issue such person a notice to appear.

Ch. 38, Illinois Revised Statutes, § 107-2(c) (1982):

107-2. Arrest by peace officer

§ 107-2. (1) Arrest by Peace Officer. A peace officer may arrest a person when:

• • •

(c) He has reasonable grounds to believe that the person is committing or has committed an offense.

STATEMENT OF THE FACTS[1]

On July 26, 1985, the Chicago police were summoned to 3554 S. Wolcott, Chicago, Illinois, by Dorothy Jackson, the mother of Gail Fischer. (J.A.47) Dorothy Jackson, a Cook County Deputy Sheriff, called the police when her daughter told her that Ed Rodriguez had beaten her. (J.A.35,46) When Officer Tenza arrived and spoke to Gail Fischer, their original investigation centered around a battery victim, namely Gail Fischer, and the possible suspect being a boyfriend (not a husband), the respondent Edward Rodriguez. (Supplemental Record [hereinafter referred to as (S.R.)] 4) Subsequently, tactical officers Entress and Gutierrez arrived at Jackson's and Fischer's

[1] Pursuant to Rule 24 of the Rules of the Supreme Court of the United States, respondent will file a Supplemental Statement of the Facts in order to correct inaccuracies and omissions in the Statement filed by the Petitioner.

apartment at approximately 2:30 p.m. There, they met with Officer Tenza. During the conversation with Gail Fischer they learned that the alleged battery had occurred earlier in the day. (S.R.13-14) Officer Tenza's police report indicated that the time of day of the battery occurrence was approximately 11:00 a.m. (J.A.8)

At the preliminary hearing, on September 11, 1985 (approximately six weeks after the defendant's arrest), Officer Entress testified that when he asked Gail Fischer if she lived with the defendant at 3510 South California, she responded:

SHE STATED SHE USED TO LIVE THERE.

(S.R.16) (emphasis added) At the hearing on the motion to suppress evidence, which occurred on August 18, 1986 (over one year after the incident), Officer Entress testified that when asked the same question Gail Fischer stated:

SHE STATED TO ME SHE HAD BEEN LIVING THERE.

(J.A.10) (emphasis added) Officer Entress further admitted that his memory of the incident could conceivably have been better on September 11, 1985 than it was on August 18, 1986. (J.A.12)

At the preliminary hearing, Officer Entress testified that his purpose for going to Ed Rodriguez' apartment at 3510 South California was to arrest Rodriguez for battery. Upon his arrival at the apartment, Officer Entress stated that he knew that Rodriguez was probably sleeping. (S.R.17) Officer Entress further testified that he did not bother to check with the landlord to find out whose apartment it was or to determine if the apartment was in

the exclusive name of Edward Rodriguez. (J.A.14) On entering Rodriguez' apartment, without knocking, (J.A.13) Officer Entress admitted that he looked through some Tupperware containers in the living room area and then looked through some briefcases in the bedroom area, all while Rodriguez was asleep in his bed. He testified that this process took approximately one and a half minutes before he woke Rodriguez to arrest him. (S.R.18-20)

At the preliminary hearing Gail Fischer was called as a witness by the state. When the Assistant State's Attorney asked Gail Fischer whose address was 3519 S. California, her response was, "Ed's." When the Assistant State's Attorney asked Ms. Fischer if anyone else lived there with Ed, her response was, "No." (S.R.24) Under cross examination, Gail Fischer stated that on July 26, 1985, she was living with her mother at 3554 South Wolcott; not at 3519 S. California. (S.R.25,26) Gail Fischer said that she was testifying for the state voluntarily and that she was not under subpoena. (S.R.27)

On August 18, 1986 a hearing was held on the respondent Rodriguez' motion to suppress evidence. At that hearing three witnesses were called; Officer Entress, Dorothy Jackson and Gail Fischer.

During his conversation with Gail Fischer at the Wolcott address, Officer Entress testified that he asked her the following question:

Q Tell me what you asked her?

A Ok. I asked her if Ed Rodriguez dealt in narcotics?

Q Ok. You asked her that?

A Yes.

Q What did she say?

A She didn't answer. . . .

(J.A.23)

Earlier in his testimony, Officer Entress had stated that he recalled having a conversation a year earlier with someone concerning an Edward Rodriguez and drugs. (J.A.22)

Prior to Officer Entress questioning Gail Fischer about whether Ed Rodriguez was a narcotics dealer, Gail Fischer was reluctant, and said she wasn't sure she wanted to sign a complaint. Officer Entress then questioned her concerning Rodriguez' narcotics dealings, and told her that if she was afraid of the police going into the apartment and locking him up, then she should tell the police that and they would not go in the apartment. It was after that statement by Officer Entress that, according to his testimony, Gail Fischer agreed to go open the door for the police. (J.A.23)

Dorothy Jackson, the mother of Gail Fischer, testified that on July 1, 1985 (25 days prior to the arrest of Mr. Rodriguez), she had assisted Gail Fischer in obtaining her clothing from Ed Rodriguez' apartment on California and that she moved out of that apartment on that date and in with her mother at the Wolcott address. (J.A.38,39) Under questioning by the court, Dorothy Jackson stated that between July 1st and July 26th, 1985, on two or three occasions Gail Fischer would return home at three or four o'clock in the morning, but that she would stay at Dorothy Jackson's apartment. (J.A.44,45)

Dorothy Jackson later testified to her recollection of the conversation between Gail Fischer and the officers. She stated as follows:

> Q. Well, tell the court the parts you heard if you would?
>
> A. Okay. She said that he beat her up and they wanted to know if she wanted to go over there and let them in. If she could let them in to get him. And she was hesitant and they said why has he got some – I'll use a difference [sic] word –
>
> Q. What is the word the officer said?
>
> A. Well, I – I don't talk that way. I don't want to say it, but another word for has he got crap in the apartment or drugs you know. And she says – just looked at them and then she said yes. And I said I believe he had it too. And that's why she was afraid to go –

(J.A.49)

Gail Fischer was the last witness to testify at the hearing on the motion to suppress. She confirmed that on July 1, 1985 she moved her children and their clothing out of Mr. Rodriguez' apartment and moved in with her mother at 3554 South Wolcott. (J.A.63) Fischer further testified that she never told the police that she was living with Rodriguez at 3519 South California, and that she had the key to Mr. Rodriguez' apartment without his permission. (J.A.65,66) Under questioning by the court, Gail Fischer testified that her name was not on the lease for Mr. Rodriguez' apartment, that she never contributed to the rent during June or July of 1985, that she never

invited her friends over to Mr. Rodriguez' apartment while he was not present, and that she never went over to Mr. Rodriguez' apartment when he was not home. (J.A.89-91)

The trial court, relying upon Illinois case law, found that Illinois would not allow for police to act on the apparent authority of a person in allowing the search of an apartment, and further, upon reviewing all the factors involved, that Gail Fischer did not have actual authority to permit the search. (J.A.94) In concluding that Gail Fischer had no actual authority to consent to search, the court found that one of the most important factors in that determination was that when she left Mr. Rodriguez she took her children with her. The court concluded therefor that she had no right or control over the apartment to allow the police entry to search and also found specifically that there were no exigent circumstances. (J.A.96)

The trial court made no findings concerning the good faith or reasonable belief of the police officers.

SUMMARY OF ARGUMENT

In the search in the present case, tactical officers from the Chicago Police Department chose to bypass the constitutionally-preferred procedures of obtaining an arrest warrant or search warrant, and even chose to bypass a front-door arrest procedure. Instead, on the pretext of making a battery arrest, the police entered respondent's apartment without knocking and searched for drugs in Tupperware containers and briefcases for a full minute-and-a-half before confronting respondent. The State seeks

to justify this highly intrusive warrantless residential search on the ground that the police had the consent of respondent's girlfriend to enter the apartment, even though *she did not live there.*

The Illinois courts that reviewed this search concluded that Gail Fischer was not a co-inhabitant as required by *United States v. Matlock*, 415 U.S. 164 (1974), and the Illinois "joint access" rule. That conclusion is clearly correct.

The State seeks to salvage this pretextual warrantless search by attempting to erect an "apparent authority" to consent doctrine. This Court should not reach that issue in this case, however, because the Illinois courts have rejected the apparent authority argument based upon Illinois State law which recognizes only *actual* authority as a legitimate basis for a third-party consent to search. Thus the rejection of apparent authority to consent in this case is based on independent and adequate state law grounds.

Examination of the State's argument serves to underscore the wisdom of the Illinois position. To begin with, the terminology of "apparent authority," which derives from the law of agency, is wholly inapplicable to this case. Gail Fischer was not an agent of the respondent in any way.

Likewise, the reasonable-factual-mistake doctrine of *Maryland v. Garrison*, 480 U.S. 79 (1987), is inapposite to the setting of police decision making in this case. The warrantless search of respondent's apartment did not occur because of an unavoidable factual error. It occurred because the police officers *chose* to ignore constitutional

principles and to conduct a warrantless search on the basis of what was at best a highly dubious third-party consent. Unlike the officers in *Garrison*, these officers were not the victims of an unavoidable error; rather, if they believed Fischer had authority to consent it was only because they did not make even the most minimal of efforts to inform themselves by asking the questions required to determine whether Fischer met the *Matlock* standard. The *Garrison* approach should not be applied to police decisions to undertake warrantless searches when constitutionally-preferred procedures are readily available.

Moreover, the police conduct in this case did not rest on any reasonable misassessment of Gail Fischer's status. According to *police* testimony, Fischer told them she *"used to live there"* or "had been living there." Despite the red flags apparent in either of these statements, the police officer testified he *did not ask further questions*. That is not reasonable police conduct.

Indeed, the evidence presented below raises serious doubts as to whether the police even acted in good faith. The procedure chosen by the police was plainly designed to allow a no-knock, surprise search for drugs; it was not in any way necessary merely to make a battery arrest. Moreover, the police apparently told Fischer she "had to" consent or a battery charge would not be made against respondent. On the record in this case, it is not at all clear that the police "mistake" regarding Fischer's authority was anything more than a deliberate refusal by them to ask questions to which they did not want to hear answers.

Finally, for the reasons stated above, even if this Court had ever created a "good-faith exception to the exclusionary rule," this case would not be an appropriate candidate for its application.

ARGUMENT

I. GAIL FISCHER DID NOT POSSESS COMMON AUTHORITY OVER RESPONDENT'S APARTMENT AND COULD NOT GIVE POLICE CONSENT TO ENTER.

The Illinois courts have consistently applied a "joint right of access" test to determine the validity of a third-party consent to search since the 1954 decision in *People v. Shambley*, 4 Ill.2d 38, 122 N.E.2d 172, 174. *See also, People v. Walker*, 34 Ill.2d 23, 213 N.E.2d 522, 555 (1966); *People v. Miller*, 40 Ill.2d 154, 238 N.E.2d 407, 409 (1968); *People v. Bochniak*, 93 Ill.App.3d 575, 417 N.E.2d 722, 724 (1981); *People v. Vought*, 174 Ill.App.3d 563, 528 N.E.2d 1095, 1100 (1988). In its 1974 decision in *People v. Stacey*, 58 Ill.2d 83, 317 N.E.2d 24, 26-28, the Illinois Supreme Court endorsed the statement of a "common authority" test for third-party consent set forth by this Court in *United States v. Matlock*, 415 U.S. 164 (1974). According to *Matlock*, "Common authority is . . . not to be implied from the mere property interest a third party has . . . but rests rather on mutual use of the property by persons *generally having joint access or control for most purposes.*" *Id.* at 171 n. 7 (emphasis added). *Matlock* expects that persons who can meet this standard are "co-inhabitants." *Id.*

The Illinois courts are clearly correct in ruling that Gail Fischer did not have common authority over the

apartment searched on the date the search occurred. Far from being a "co-inhabitant," Fischer *and her children* were living at her mother's house on the date of the police search. The trial judge found that Fischer "was not a usual resident" of the apartment, (J.A.95, 96) but was "a rather infrequent visitor or resident or guest or invitee." (J.A.95) The judge also found that "Fischer apparently was not [at the apartment] when the [respondent] was not there" and that she was like "a guest who only has access to a place when his host was there," (J.A.95) and "was not allowed . . . to invite other people, friends or acquaintances [to the apartment] on her own." (J.A.96) These factual findings clearly show that Fischer did not meet the *Matlock* standard of a person who "generally [had] joint access or control for *most* purposes." Fischer was not a "co-inhabitant" who had "the right to permit the inspection in his own right and that the others have assumed the risk that one of their members might permit the common area to be searched." *Matlock*, 415 U.S. at 172 n.7. Clearly, if Fischer did not have authority to invite a friend in, she certainly did not have authority to invite the police.

In fact, one uncontested but salient fact in this case distinguishes it from *Matlock* and from the other cases the State and the Solicitor General cite as correctly applying *Matlock*. *Fischer was not respondent's wife.* While *Matlock* makes it clear that a matrimonial relationship does not suffice to establish "common authority," it is virtually always present in cases finding "common authority" to

consent.[2] There was, however, only a casual relationship between Fischer and the respondent. (Respondent was Fischer's "boyfriend.") (S.R.4)[3]

Moreover, the point in *Matlock* regarding property interests was that a mere property interest in the premises does *not suffice* to show "common authority" to consent to entry. In the present case, Fischer did not even have a property interest in the apartment. The trial judge found "[s]he was not on the lease and did not contribute to the rent." (J.A.95) A name on a lease is not "the precise type of property concept . . . condemned in *Matlock*" (Ill.Br.30); rather it is the kind of property interest the court assumed would underlie – but not suffice for – claims that third parties had co-authority to consent.

The State's argument that Fischer meets the *Matlock* "co-inhabitant" standard consists primarily of assertions

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[2] E.g., the State relies on *State v. Madrid*, 91 N.M. 375, 574 P.2d 594 (1978), as a case "with facts similar" to the present case. (Ill.Br.31) But the third party in *Madrid* was, as the State admits, a *wife* (Ill.Br.31). That is not "similar" to the present case. Likewise the State relies on *Sullivan v. State*, 716 P.2d 684 (Okl.App.1986), but that case also involved a *wife* (Ill.Br.33).

The Solicitor General cites three federal decisions in its footnote arguing that Fischer meets the *Matlock* standard for actual authority to consent. As the parenthetical descriptions of all three cases show, the third party who gave consent in each case was the wife of the defendant. (S.G.Br.20 n.16)

[3] The presence of a matrimonial relationship is so commonplace in the cases finding "common authority" that the Amicus Brief filed by Americans for Effective Law Enforcement bases its argument on the erroneous assumption that Fischer was "defendant's wife." (A.E.L.E.Br.8) She was not.

that ignore, contradict, or artfully distort the factual findings made by the trial judge – findings that must be upheld under Illinois law unless they are clearly erroneous. *People v. White*, 117 Ill.2d 194, 512 N.E.2d 677 (1987). For example, the State's brief presents arguments regarding Fischer's possession of a key to the apartment. (Ill.Br.28) Mere possession of a key does not create common authority under *Matlock*. See *e.g. People v. Weinstein*, 105 Ill.App.2d 1, 245 N.E.2d 788, 790 (1968). Keys may be possessed by third parties for a multitude of reasons, only some of which could be viewed as tending to indicate common "control for *most* purposes." *Matlock*, 415 U.S. 164, 171 n.7.[4] Indeed, this Court refused to give weight to the mere possession of a key in *Stoner v. California*, 376 U.S. 483 (1964) (hotel clerk's possession of guest's key did not confer authority to consent to search of guest's room). In the present case, Fischer testified that she, in effect, *stole* the key. (J.A.65-66) A stolen key can hardly create "common *authority*" to consent. It is true that there is conflicting testimony on how Fischer came to have the key. The State, however, improperly asks this Court to make a factual finding and accept a version of how Fischer came to have this key that is most favorable to the State (the losing party) when the trial judge, who heard the witnesses, explicitly stated that he could not decide how Fischer came to have a key on the date of the search. ("The key question, I think is neutralized . . . I don't know on the key." (J.A.95) The key is irrelevant to the question whether Fischer had "common authority."

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[4] How many neighbors have been given keys to water plants or take in the mail while a resident is away?

Similarly, the State repeatedly makes misleading assertions about the whereabouts of Fischer's property at the time of the search,[5] and stresses the irrelevant fact that Fischer left several large items in the apartment when she moved out approximately a month before the search occurred, including a stove, refrigerator and some furniture.[6]

Gail Fischer does not even approach *Matlock's* "co-inhabitant" status.

II. THE ONLY ISSUE PROPERLY BEFORE THE COURT IS WHETHER GAIL FISCHER HAD ACTUAL AUTHORITY TO CONSENT: THE ILLINOIS COURTS' RULING THAT ONLY ACTUAL COMMON AUTHORITY CAN SUPPORT A CONSENT TO SEARCH RESTS EXCLUSIVELY ON ILLINOIS STATE CONSTITUTIONAL LAW AND SHOULD NOT BE DISTURBED BY THIS COURT.

As this Court reiterated in *Michigan v. Long*, 463 U.S. 1032, 1041 (1983), when a state court decision is based

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[5] For example, that "*all* [Fischer's] possessions remained at [respondent's apartment]." (Ill.Br.30) (emphasis added) In fact, Fischer had taken her and her children's clothing when she moved in with her mother. (J.A.38-40, 63).

[6] The trial judge did not find these facts significant enough to address them in his findings, and the reason is clear enough. As Fischer testified, she left those items behind on loan to respondent because there was no need or room for them at her mother's apartment and respondent otherwise would not have those items to use. (J.A.82,95) Clearly, the mere loan of appliances or furniture, or the mere storage of other items like dishes, does not give rise to "common authority" over an apartment. The trial judge was correct to ignore these facts.

"on bona fide separate, adequate and independent [state law] grounds, we, of course, will not undertake to review the decision." This Court has previously recognized that its jurisdiction must be exercised on an issue-by-issue basis.[7]

As argued by the State, this case presents two distinct issues: (1) whether Gale Fischer had actual common authority to consent to the search of respondent's apartment; and (2) if she did not possess actual authority, whether the search can be justified by resort to arguments based upon "apparent authority" or a reasonable appearance of authority.[8]

While respondent concedes that the Illinois Appellate Court relied on federal law (*Matlock*) in deciding the first question, it is readily apparent that both the trial court and the Illinois Appellate Court considered only state law in turning aside the State's "apparent authority" arguments. The Illinois courts' insistence that only actual common authority can suffice for a consent to search – a position with deep roots in Illinois state constitutional law – is clearly a "bona fide separate, adequate and

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[7] E.g., *Illinois v. Gates*, 462 U.S. 213 (1983).

[8] It is evident that the requisites for actual "common authority" to consent is an entirely different matter in conceptual terms from the question of whether any grounds other than actual "common authority" should be recognized as providing a legally valid justification for a "consent" search. For example, the text of the Solicitor General addresses only the latter issue of a reasonable appearance of authority to consent, confining its discussion of actual authority to a footnote. S.G.Br.20 n.16

independent" state law ground for the rulings in this case. Therefore, under principles of jurisdiction, federalism, and comity, only the issue of whether the Illinois courts correctly construed *Matlock's* concept of "common authority" is properly before the Court.

As this Court has previously recognized,[9] Illinois is a state with a long tradition of granting protections against unreasonable searches as a matter of state constitutional law that extend beyond those afforded by the Fourth Amendment.[10] As discussed in Section I, *supra*, the Illinois Supreme Court has consistently required actual common authority for consent searches for 36 years beginning with the *Shambley* decision.[11] Moreover, the

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[9] E.g., *Illinois v. Gates*, 462 U.S. 213, 217-224 (1983) (recognizing the independent adoption of a state exclusionary rule by Illinois in 1923, prior to *Mapp to Ohio*, 376 U.S. 643 (1961)).

[10] It is noteworthy that the Constitutional Commentary to Art. I, §6, the Illinois Search and Seizure provision, explains that: "Section 6 *expands upon* the individual rights which were contained in Section 6 of Article II of the 1870 Constitution and the guarantees of the Fourth and Fourteenth Amendments to the United States Constitution. Illinois Constitution, Art. I, §6, Constitutional Commentary, Smith-Hurd Ann. Stat. (1971) (emphasis added).

[11] The decision in *People v. Shambley*, 4 Ill.2d 38, 122 N.E.2d 172, 173 (1954) was expressly grounded on the Illinois state constitution's search and seizure provision, Section 6 of Article I, and does not mention the Fourth Amendment. Of course, following the increase in federal search and seizure cases in the aftermath of the 1961 decision in *Mapp v. Ohio*, 367 U.S. 643 (1961), Illinois cases also refer to federal cases. For example, several Illinois cases cite *Stoner v. California*, 376 U.S. 483 (1964). Because the decision in *Stoner* was entirely consistent

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record in this case leaves no doubt that the rulings of the Illinois courts rejecting the State's arguments regarding "apparent authority" to consent have been based *exclusively* on the controlling Illinois Supreme Court decisions.

Judge Schreier, who decided the motion to suppress, recognized that federal law may differ, but relied on the controlling Illinois law:

> I think I am obliged to follow the present situation in Illinois which would not allow for police to act on the apparent authority of the person in allowing the search of an apartment, the person in this case being Gayle [sic] Fischer. Maybe that will change. It might change tomorrow.
>
> The present state of the law does not allow for it and *Adams*[12] can only be instructive and I think can only really be acted on and adopted by a reviewing court and not by the trial court, given

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with the existing Illinois rule in *Shambley*, however, *Stoner* simply reinforced the Illinois courts' commitment to their existing rule. At no point did Illinois change its existing rule because of federal decisions. It is thus evident that the Illinois Supreme Court has viewed itself as continuing to set forth the *Illinois* search law rule in the cases following *Shambley*. E.g., *People v. Bochniak*, 93 Ill.App.3d 575, 417 N.E.2d 722, 724 (1981) (referring to "the strong Illinois trend" of refusing to apply the "apparent authority doctrine"; *People v. Vought*, 174 Ill.App.3d 563, 528 N.E.2d 1095, 1100 (1988) (referring to "decisions in prior Illinois cases rejecting [the apparent authority doctrine]"). Thus the *Shambley* standard has continuously been the law of Illinois for 36 years.

[12] The reference to *Adams* is a reference to, *People v. Adams*, 53 N.Y.2d 1, 422 N.E.2d 53 (1981), a case the State had cited in its "apparent authority" argument.

> the fact that there are Illinois reviewing court opinions on the subject.

(J.A.94)

The Illinois Appellate Court also chose to adhere to the Illinois case law and rejected the apparent authority argument presented by the State:

> In reviewing the record in the instant case, we note that the trial court properly rejected the State's contention that Fischer had the apparent authority to consent. This conclusion is consistent with prior Illinois cases rejecting the argument that warrantless entries and searches may be upheld if the party who consented to the entry had apparent authority to do so but lacked actual authority.

(J.A.103)

Finally, and significantly, the Illinois Supreme Court declined to review the Appellate Court's decision notwithstanding the State's request for the court to consider whether "apparent authority" to consent would justify a search. *People v. Rodriguez*, 125 Ill.2d 512, 537 N.E.2d 816 (1989). Thus, the record in this case shows a consistent application of *state* law requiring nothing less than actual common authority for consent to search.

It is true that the Illinois Appellate Court's opinion does not contain an explicit statement, per *Michigan v. Long*, 463 U.S. 1032, 1042 (1983), that its rejection of any consideration of "apparent authority" arguments is based exclusively on state law. But such a statement is hardly necessary here because it is beyond any argument that it is *impossible* for the Illinois Appellate Court's ruling on this issue to rest on its interpretation of federal decisions.

The Illinois Appellate Court opinion only cites a single federal case, this Court's ruling in *Matlock*, and the discussion of *Matlock* is confined to its rendition of the requisites for common authority sufficient to support consent to a search. (J.A.102) Significantly, however, the Illinois Appellate Court does not refer to *Matlock* in connection with its ruling that "apparent authority" or a reasonable appearance of authority to consent cannot suffice to justify a search under Illinois law. Indeed, there is no way the Illinois courts could have gained any guidance from *Matlock* on the issue whether anything less than actual common authority can support a consent to search, because *Matlock explicitly declines to address that question*. See *Matlock*, 415 U.S. at 177 n.14. It is patent that an opinion that expressly declines to reach an issue cannot be "relied on" in any way in deciding that issue. Therefore, the only issue properly before this Court is whether the Illinois Appellate Court properly interpreted and applied the requisites for actual common authority set forth in *Matlock*.[13]

Declining to reach any issue other than the application of the *Matlock* standard would also be prudent given the state of the record below. Because there was no question but that Illinois law would accept only actual common authority as a basis for a third-party consent,

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[13] Because this Court's order has granted certiorari on both of the questions presented by the State, respondent, in deference to the Court, will address the merits of the State's "apparent authority" argument. Respondent does so, however, without conceding that the "apparent authority" issue is properly before the Court.

respondent did not seek to develop a full record regarding police motivations or perceptions that might be relevant to the application of a "reasonable appearance of authority" claim. Likewise, the trial court made no such findings. Surely, if "apparent authority" is as widely used in federal cases and the cases of other states as the State and the Solicitor General claim, then this Court will have better opportunities to decide this important issue.[14]

III. GAIL FISCHER DID NOT POSSESS "APPARENT AUTHORITY" TO CONSENT TO ENTRY.

The briefs filed by both the State and the Solicitor General loosely intermix arguments based on "apparent authority" to consent and on "appearance of authority" to consent as if they were substitutable. They are not.

The term "apparent authority" has well-known connotations in the law of agency. In agency doctrine, of course, it is hornbook law that an agent is said to have "apparent authority" (as distinguished from actual authority) if the principal has represented or manifested

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[14] The Solicitor General's brief seriously oversimplifies the situation below when it states that the Illinois courts "have not passed on the application of apparent authority principles to the facts of this case." (S.G.Br.20 n.17) In fact, the facts that would be pertinent to the application of any such "principles" have not been developed in the testimony because third-party consent cannot be based on anything less than actual authority under Illinois state law. By the time this Court rules in this case, approximately five years will have expired since the search at issue. That is hardly an ideal time to begin to take testimony on police conduct to resolve issues relating to the potential pretext and bad faith suggested by the existing record in this case. See Section IV.B.2.

in some other way to a third party that the agent is authorized to act on behalf of, and bind, the principal in dealings with the third party. It is also hornbook law, of course, that *an agent cannot create apparent authority by his own representations;* rather, apparent authority can only be created by the manifestations the principal makes to the third party. *Restatement (Second) of Agency*, §27 (1958). So far as respondent can determine, the terminology of "apparent authority to consent" may have come into use in search cases because certain landmark decisions did involve *agency law* arguments.[15] Moreover, it is possible that "apparent authority" terminology has been used in some state and federal decisions in this area because the third party who consents to a search typically is a person with some type of formal relationship to the defendant – usually a spouse (see *supra* p. 14, notes 2, 3) – which might be viewed as giving rise to a colorable agency relationship.

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[15] For example, in *Stoner v. California*, 376 U.S. 483 (1964), this Court refused to uphold a search of an occupied hotel room on the basis of the consent of the hotel clerk rather than the consent of the hotel guest renting the room. It appears California argued that when a hotel guest turned in his key to the desk clerk when going out, the guest conferred apparent authority on the clerk to consent to entry of the guest's room. In rejecting the third-party consent in *Stoner*, this Court wrote that "[t]he rights protected by the Fourth Amendment are not to be eroded by strained *applications of the law of agency* or by unrealistic doctrines of *"apparent authority." Id.* at 488 (emphasis added). Although *Stoner* clearly disapproves of "apparent authority" claims in consent searches (i.e., *Stoner* refers to "unrealistic claims of 'apparent authority' "), it is possible that it may nonetheless have introduced apparent authority terminology to third-party consent search cases.

The instant case, however, does not require that this Court address the question whether or how agency law applies to a third-party consent to search. The salient feature of this case is that there is absolutely no plausible agency relationship.[16]

There is not even a suggestion that respondent ever represented to the police that Fischer was his agent or that he had conferred upon her any authority to consent to their entry. Neither is there any marriage relationship from which even a "strained" argument of an "agency" relationship could conceivably be made. The doctrine of apparent authority is totally inapplicable to this case. The usage of this terminology by the State and the Solicitor General seriously obfuscates the issue by implying Fischer had a stronger relationship to the respondent and his apartment than she did.

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[16] The "apparent authority" doctrine is not used as widely in third-party consent cases as the State suggests. While the state and federal decisions the State cites in footnote 1 of its brief often refer to "apparent authority," many are actually decided on actual authority grounds or other grounds. See cases cited at Ill. Br. 13, n.1.

IV. THE SEARCH CANNOT BE JUSTIFIED ON THE GROUND THAT GAIL FISHER APPEARED TO HAVE AUTHORITY TO CONSENT IN THE EYES OF THE POLICE.

A. The Ill-considered *Police Decision* to Undertake an Especially Intrusive Warrantless Search of Respondent's Residence Should Not Be Equated With the Unavoidable Factual Error Committed by Police During the Execution of a Search Warrant in *Maryland v. Garrison*.

Both the State and the Solicitor General argue that this case should be decided using the reasonable-factual-mistake approach set forth in *Maryland v. Garrison*, 480 U.S. 79 (1987), and *Hill v. California*, 401 U.S. 797 (1971). The dangerous premise underlying their position is an implicit claim that the police have no duty to take even obvious steps to inform themselves as to the validity of the authority of a third-party whose "consent" is to provide a legal justification for an otherwise blatantly unconstitutional warrantless search of a residence. The approach taken in *Garrison* and *Hill* should not be applied here.

Garrison and *Hill* excuse only genuine *unavoidable* factual errors made by police in the course of *executing* searches or arrests.[17] In contrast, this case involved an

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[17] In *Garrison* the police were executing a warrant search of an apartment when they unknowingly entered a second apartment. The physical layout of the apartment was such that the officers had no way of knowing that they had strayed beyond the warrant. Significantly, in *Garrison*, the police had

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unwarranted police decision to bypass constitutionally-favored procedures and conduct a highly intrusive warrantless search on the basis of an obviously dubious "consent" by a third party known to be hostile to the resident of the apartment. As set forth below, there is nothing reasonable, unavoidable, or understandable about the cavalier police disregard of Fourth Amendment rights in this search. There is simply no comparison between the dimensions of the police errors in *Garrison* and *Hill* and the ill-considered, if not outright bad faith (see Section IV.B.2, *infra*), choice made by the officers in this case.

Unlike the situation involving unavoidable factual errors in *Garrison* and *Hill*, the police clearly had the opportunity to avoid the unconstitutional search of respondent's apartment. These experienced officers[18] did not inadvertently fall into error; rather they *chose* to ignore at least three alternative *valid* means of proceeding, and they did so despite clear constitutional preferences for those alternative procedures. First, the police could have obtained an arrest warrant, but – despite this Court's emphatic disapproval of warrantless entries of

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followed constitutionally-favored procedure and obtained a search warrant prior to the search. In *Hill*, the police went to Hill's apartment to arrest Hill; when Miller came to the door of Hill's apartment he matched the description the police had of Hill and the police were not able to detect their mistake. (Miller did show the police his identification but it is understandable that the police would be too skeptical of the possibility of forged identification to release an arrested suspect on that basis alone.)

[18] Officer Entress was a 12½ year veteran. (J.A. 3)

residences for purposes of effecting arrests, *Payton v. New York*, 445 U.S. 573 (1980) – the police chose to make a warrantless entry. Second, the police could have sought to obtain a search warrant to search for drugs in respondent's apartment,[19] but – despite this Court's repeated statements that warrant searches are preferable to warrantless searches, especially when a residence is involved – the police did not seek a search warrant. Third, if the police were primarily interested in arresting respondent for battery, the police could have simply knocked on the door to his apartment and made a front-door arrest when he answered (as occurred in *Hill*). Alternatively, the police could have obtained a summons signed by a judge or a notice to appear signed by a police officer issuing the notice to appear and mailed either of those documents to respondent commanding him to appear in court on a certain date and time.[20]

The police chose, instead, to ignore constitutionally-preferred procedures and enter on the basis of a highly dubious third-party "consent" (the clear indicators, apparent to the police at the time of the search, that Fischer was not a co-inhabitant with common authority to

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[19] It is likely that the police could have developed probable cause by using Gail Fischer as an informant. She affirmatively answered a police question, before the search, as to whether there were drugs in respondent's apartment. (J.A.49) The police apparently made no attempt to develop probable cause, however; they *did not ask* her further questions to establish her credibility, the basis of her knowledge regarding drugs in respondent's apartment, or the timeliness of her information, etc.

[20] See Ill.Rev.Stat. ch. 38 §107-11 (1987) and §107-12 (1984).

consent are discussed in Section IV.B.1, *infra*), and to undertake an arrest which was clearly a pretext for a search for drugs for which probable cause had not been developed (the pretextual nature of the entry is discussed in Section IV.B.2, *infra*). This police conduct is the antithesis of the faultless police conduct in *Garrison* – where the police *had obtained a magistrate's approval of a search warrant*. Likewise, the procedure chosen by the police in this case was far more drastic and invasive than the front-door arrest procedure followed in *Hill*.[21] *Compare* the typical restrictions on home arrests in effect even prior to *Payton v. New York*, 445 U.S. 573, 616-617 (1980) (White, J., dissenting). In short, there is simply no comparison between the discreet, unavoidable factual errors in *Garrison* and *Hill* and the police decision in this case – which the officers chose to make themselves despite the absence of any exigent circumstances (J.A. 96) – to proceed on the basis of a constitutionally dubious justification for a warrantless entry and search.

The fundamental defect in the State's factual error argument is the premise that the police in this case were simply passive receptors of factual information rather

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[21] If no one had been in the apartment in *Hill*, no one would have come to the door, there would have been no arrest, and no search would have occurred. In the present case, however, the police entered without knocking, searched for a full minute and half including looking in Tupperware containers and briefcases, and only then determined that respondent was present in the apartment. (S.R. 18-20) Had respondent been absent, his apartment would still have been searched. The front-door arrest in *Hill* is clearly more sensitive to Fourth Amendment values than the procedures utilized here.

than active decision makers with an obligation to inquire sufficiently to make an informed decision as to whether there was justification to conduct a *warrantless* search. The State describes the police in this case as if the officers could do nothing more than passively receive information that came to them.[22] That is ludicrous. These experienced officers had substantial control over the information at their disposal to determine whether Gail Fischer had valid authority to consent to their entry. Specifically, the police can, and should, ask obvious, common sense questions of a third party who is prepared to consent to entry to determine whether the person's relationship to the premises meets *Matlock's* "common authority" standard. In this case, as discussed *infra*, the police could have asked Gail Fischer "Do you live at this apartment at the present time?" If they had asked, they would have learned she did not and, thus, she did not have authority. But *they did not ask* that question, or many questions of any kind, for that matter (see Section IV.B.1, *infra*).

Indeed, if the police choose to make the decision whether to institute a search without obtaining the approval of a magistrate (or, in this case, even of a police superior), the officers clearly have a duty to make the same kind of *informed* assessment of the validity of the

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[22] The passive characterization of the officer's role is evident in numerous phrases that suggest that information comes to the officers rather than that they acquire it. E.g., the police "reasonably *rely on* objective facts and circumstances" (Ill.Br.9) (emphasis added); "objective facts *presented to* the officers" (*Id.* at 10) (emphasis added); police "can only be expected to deal with *what is apparent* to them" (*Id.* at 20) (emphasis added).

legal basis for the search that a magistrate would be expected to make. Officers in this decision-making situation do not do their duty if they merely seize upon isolated facts that *might* tend to show common authority while they disregard red flags and ignore obvious questions. The State's view, however, would seem to be that if a police officer can identify *any* fact or facts which might tend, considered in isolation, to show authority to consent, then the officer may cease any further inquiry, suspend judgment, and completely ignore contradictory evidence because the police officer had a "reasonable belief" based on "what is apparent" that the third party can give valid consent. The State further suggests that this rather arid conception of the role and capabilities of the police is required lest the police be overburdened and forced to deal with legal "niceties."[23] That is hardly the case.

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[23] The State relies heavily on the recent Seventh Circuit decision in *United States v. Rodriguez*, 888 F.2d 519 (1989) (no relation to the present respondent) in which Judge Easterbrook writes that:

> Going beneath the surface of the information at hand . . . furnished . . . by a person giving consent – would make the outcome of the search depend on the niceties of property or marital law far removed from the concerns of the Fourth Amendment. Consents would become untrustworthy unless the police spent additional time investigating the authority of the person who gave consent, which in a case like ours would require knowledge of Illinois domestic relations law and the living arrangements of the couple.

With all due respect, Judge Easterbrook has it backwards, and writes as if the only appropriate concern regarding standards

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Asking a simple question like, "Do you *currently* reside at this apartment" is hardly burdensome (the person who is giving consent is obviously available to answer) and hardly constitutes an "investigation." Moreover, application of the common-sense *Matlock* standard of "common authority" for "most purposes" (which is the standard the police are *required* to know and apply) hardly demands knowledge of "the niceties" of domestic relations law. If there was a police error here (as opposed to outright bad faith), the police clearly had the opportunity and means to avoid it. The violation of respondent's Fourth Amendment rights in this case resulted from the failure of the police to ask simple questions.

Further, the need for the police to make reasonable efforts to inform themselves before accepting the validity of a third-party's consent is particularly strong given the especially sensitive nature of third-party consent issues. In rejecting any expansive or loose construction of third-party "consent" for a search in *Stoner v. California*, 376 U.S. 487 (1964), Justice Stewart wrote:

> It is important to bear in mind that it was the petitioner's constitutional right which was at

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for third-party "consent" is to assure the admissibility of evidence seized under a claim of third-party consent *regardless* of the validity of the consent. If Fourth Amendment rights are taken at all seriously, it is evident that care must be taken so that privacy rights are not too readily sacrificed by bogus third-party "consent". Consents are "untrustworthy" *unless* the police take the time to ask basic questions of the person offering to "consent." Asking about "the living arrangements" is exactly what *Matlock* calls for.

> stake here, and not the night clerk's nor the hotel's. It was a right, therefore, which only the petitioner could waive by word or deed . . .

Id. at 489. This same consideration applies here with equal force. Respondent's Fourth Amendment rights are at stake here, not Gail Fischer's. Only respondent had a legitimate expectation of privacy in the apartment, so only he should be allowed to waive that privacy by consenting to a search.

This Court has stressed the personal nature of Fourth Amendment rights. For example, the Court has held that "Fourth Amendment rights are personal rights which . . . may not be vicariously asserted." *Rakas v. Illinois*, 439 U.S. 128, 133 (1978)(quoting *Alderman v. United States*, 394 U.S. 165, 174 (1969)). It would be incongruous if rights that cannot be vicariously asserted can be vicariously waived,[24] but that is effectively what an endorsement of a loose "appearance of authority" to consent would mean. The Fourth Amendment was written to protect the privacy interests of individual citizens. Citizens' reasonable expectations of privacy are not protected when police fail to make reasonable inquires into the validity of a third party's "consent" to search a residence.

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[24] It is interesting to speculate what the State's position would be in this case if an illegal search of respondent's apartment had produced evidence incriminating Gail Fischer and Fischer were being prosecuted. It seems highly likely that in that hypothetical circumstance the State would be asserting, on the *same* facts now before the Court regarding Fischer's relation to the apartment, that Fischer lacked a sufficient "legitimate expectation of privacy" in respondent's apartment to have standing to challenge the search.

Contrary to the State's claims, this Court will not impair any *legitimate* law enforcement interest by refusing to stretch *Garrison's* reasonable-factual-error doctrine to instances -- like the present case – in which the police deliberately choose to forego obtaining a search warrant because they think they can seize upon an isolated fact or two to concoct an allegation of third-party consent to search. As this Court has indicated repeatedly, the Fourth Amendment contains a strong preference for warrant searches over warrantless searches, including consent searches.[25] Approval of a loose "reasonable appearance of third-party consent" standard would amount to an open invitation for police to subvert the warrant preference. It would also invite the police to disregard the *Matlock* "common authority" standard and replace it with the rule of thumb that a third-party consent can be based upon *any* isolated indicia of potential cohabitation (e.g., storage of furniture or mere possession of a key) that could arguably present a "reasonable appearance" of authority to consent. The practical import of a "reasonable appearance" standard would be to teach the police to *not ask* the very questions about living arrangments which the *Matlock* standard requires.

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[25] *See e.g., Gates*, 462 U.S. at 236 (given the "Fourth Amendment's strong preference for searches conducted pursuant to a warrant," warrant affidavits submitted by police should not be reviewed hypertechnically lest "the police might well resort to warrantless searches, with the hope of *relying on consent* . . . ")

Mistaken assessments of the validity of third-party consent should be regrettable and infrequent exceptions in police work. The "reasonable-mistake" approach advocated by the State, however, would raise mistaken assessments of consent to the level of standard police practice. This Court should not invite police to take Fourth Amendment rights so cavalierly.

B. Even If The Approach Taken In *Garrison* Were Applied To The Search In This Case, It Is Clear The Police Had No Reasonable Basis To Believe That Gail Fischer Could Give Consent And There Is Reason To Doubt That The Police Acted In "Good Faith".

Because Illinois law only accepts actual authority as a basis for consent to search, the record below is not fully developed regarding the police conduct in this case. Even so, it is evident that the police at least failed to reasonably inform themselves about the validity of Fischer's authority to consent, and there are ample reasons to suggest that the search at issue was initiated in bad faith, with a willful **disregard of respondent's rights.**

1. Gail Fischer's Statements Plainly Put The Police On Notice That She Did *Not* Possess Authority To Consent.

Gail Fischer was not living at respondent's apartment on the date of the search (or for at least a month before). Consistent with its passive characterization of police officers, the State offers the lame excuse that the officers "were not told" this fact. (Ill.Br.16) However, police testimony shows that Fischer did make statements that put

the police on notice that she was not a current resident of the apartment prior to the search. At the preliminary hearing, Officer Entress testified that prior to the search, Fischer told him "she *used to* live" at respondent's apartment. (J.A.10-11, S.R.16). Subsequently, at the suppression hearing, the same officer testified that Fischer said she "had been living" at the apartment. (J.A.10-12)[26]

Fischer's statement that she "used to live" at the apartment showed conclusively that she was not a co-inhabitant and could not validly consent to police entry of the apartment. There is no way a police officer who heard that statement could "reasonably believe" that Fischer could give valid consent. Indeed, even if Fischer had said she "had been living" at the apartment, the statement is, at best, so wholly ambiguous as to whether she was a resident of the apartment *at the time* that a reasonable police officer would have realized a follow-up question had to be asked of Fischer to clarify her current residence. But *the police did not ask that further question.*[27] As Officer Entress testified, he "didn't go into specific's with her as if she had just moved out or anything like that." (J.A.10) It is undisputed that the police never asked

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[26] Officer Entress admitted that his recollection of Fischer's words could conceivably have been better on the date of the preliminary hearing when he had testified that Fischer said "she used to live there." (J.A.12)

[27] Officer Entress testified it was his "impression" that she was living at respondent's apartment on the date of the search (J.A.11), but, as the State concedes, subjective police "impressions" are of no weight whatsoever. (Ill.Br.14)

Gail Fischer the obvious question "do you *currently* live at that apartment?"[28]

The failure of the police to pursue the question of Fischer's current residence on the day when she "consented" to their entry is all the more remarkable in light of the officers' awareness of two additional factors. First, they were aware that Fischer was not married to the respondent. (S.R.4) While marriage may not be a precondition for valid consent under *Matlock*, the absence of a marital relationship clearly requires some additional inquiry by the police to determine whether there is substantial co-inhabitation or only casual visitation. Second, the police knew that Fischer was hostile to respondent at the time she gave her "consent" to entry. Indeed, she wanted him prosecuted for battery. It was also obvious that Fischer's mother, a deputy sheriff herself (J.A.35), who was urging her daughter on, was hostile to the respondent. (J.A.76) In that circumstance a reasonable officer would recognize that extra care was required in assessing the validity of the "consent." No care was shown here, however.

Significantly, the record contains no indication that the police asked many questions at all. Although Fischer was interviewed at her mother's home where she was living with her children, there is no indication the police asked about her children's whereabouts. Moreover, there

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[28] Fischer's alleged casual use of the phrase "our apartment" can hardly be a sufficient ground for excusing the police from determining her current residence. Given that she "used to live there," it would not be surprising if she still sometimes called respondent's apartment "ours."

are no findings by the trial judge regarding the credibility of police testimony in the present case. It is highly implausible, however, that Fischer ever made one statement which the State relies on heavily. The State, based on Officer Entress' testimony, claims that Fischer told the police that *"all her clothes* and her furniture were in [respondent's] apartment . . . " (Ill.Br.14, 15 (emphasis added); see also *id.* at 10 ("all of her possessions")).[29] There is no question, however, that *none* of Fischer's clothing was in respondent's apartment[30] – a factual inconsistency the State attempts to hide with artful language.[31] Hence it is highly implausible that Fischer ever told Officer Entress *"all"* or even any of her clothing was at respondent's apartment.[32] The implausibility of that police testimony also calls into question the credibility of other police claims regarding what Fischer told them before the search.[33] The record below simply does not

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[29] The trial judge made no finding regarding the credibility of this police testimony regarding Fischer's statements.

[30] The trial judge *found* that Fischer had "taken the clothes" to her mother's. (J.A.96).

[31] The State asserts that Fischer took "three bags of clothing" (Ill.Br.26) or "some clothing" (Ill.Br.27). In fact, however, there is nothing in the record to indicate that Fischer left any clothing *at all* in respondent's apartment. (*See* J.A.38-40; 63)

[32] Fischer had no motive to lie about this; she had no reason to believe that the location of her clothing could affect the police handling of the battery incident.

[33] That Fischer told the officers she had "her own key" to respondent's apartment (J.A.6) is not corroborated by Fischer's or Jackson's testimony.

establish that the police had reasonable grounds to think Fischer co-inhabited the apartment to be searched.

2. There Is Ample Reason To Doubt That The Police Conducted This Search In "Good Faith".

The State's brief asserts numerous times that the police acted in "good faith" in conducting this search. That is merely an advocate's bald assertion. The trial court made no finding whatsoever regarding the motives or state of mind of the police. Had the court considered the issue, however, there is ample evidence that would have allowed Judge Schreier to conclude that the police did not act in good faith. In particular, the pattern of the police conduct strongly suggests that the officers were primarily interested in springing a no-knock, surprise search for drugs and that the battery arrest was simply a pretext to gain admission to respondent's apartment without his knowledge of their entry. In addition, there is testimony that suggests that Fischer was effectively coerced into opening the door of the apartment.

If the officers were simply trying to effectuate a battery arrest, there was no reason for them to do anything but knock on respondent's front door and arrest him when he answered. That is not what the police did, however. The events leading to this search began when Fischer's mother, Dorothy Jackson – a law enforcement officer herself (J.A.35) – called the police regarding her daughter having been beaten. Officer Tenza responded to the call and met Fischer and her mother at their apartment. Although the record is not fully developed, it is

apparent that the subject of drugs in respondent's apartment came up because Officer Tenza promptly called in officers from the Chicago Police Department's District Tactical Team. (J.A.4) Tactical team officers primarily work with narcotics cases, not simple batteries;[34] obviously the police were seeking drugs here virtually from the outset. After the tactical officers arrived, they asked whether there were drugs in respondent's apartment and were told there were. (J.A.49) Tactical officer Entress had heard rumors of respondent's involvement with drugs on a prior occasion. (J.A.22-24)

Thus, it is quite probable that the police elected to "rely on" a claim that Fischer had given consent so that they would have a pretext to enter and search respondent's apartment for drugs without giving him any advance warning of their entry. That is exactly what they did. The record reveals that the police spent at least one-and-a-half minutes in respondent's apartment before they confronted him. (J.A.18-19) During that time they looked in Tupperware containers and brief cases. (J.A.19-22)

Further, the police officers' apparent desire to make a "consent" entry may well explain the absence of questions – they did not want to hear the answers. Indeed, it even appears that the police told Fischer she *had to* let them into respondent's apartment with a key if she

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[34] As the trial judge was doubtless aware, the tactical team is a special unit of the Chicago Police Department which deals primarily with narcotics investigations.

wanted him sanctioned for battery.[35] Illinois law, however, did not require Fischer's presence for a battery arrest. Even if Fischer's acquiescence in opening the door might meet the "consent" standard set out in *Schneckloth v. Bustamonte*, 412 U.S. 218 (1974), the coercive character of the police conduct further demonstrates that this is not a case where the officers were "presented with" any "reasonable appearance" of a valid third-party consent.[36]

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[35] Although the State has characterized Ms. Fischer as having "volunteered" to let the police into respondent's apartment (Ill.Br.15), the testimony shows otherwise:

> Q [by the State]: And you told [the police] he was over at the apartment on California?
> A [by Ms. Fischer]: Yes.
> Q: And you told them you would take them over there, didn't you?
> A: Yes. They told me that was what I had to do.
> Q: They told you you had to do that?
> A: In order to –
> Q: Didn't –
> THE COURT: In order to what?
> A: If I wanted to press charges.
>
> • • •
>
> Q: And you told them that you would let them into the apartment so that they could arrest the defendant correct?
> A: Well they told me that's – That was what I had to do.

(J.A.77-78) This testimony would certainly allow a judge to find that the police effectively required Fischer to accompany them to the apartment solely as a pretext to conduct a warrantless search for narcotics.

[36] Ill. Rev. Stat., ch. 38 §107-2(c)(1982)

Properly viewed, the State's claims of good faith and reasonableness are less than compelling. In the circumstances, it is not clear that the police suffered from any misunderstanding. Their conduct is consistent with an intent to use Fischer and the key she had to gain entrance to respondent's apartment for a surprise drug search and they may well have turned a blind eye to indications that she did not have valid authority to consent. Good faith cannot emerge from the shadow of such questionable police conduct. Good faith must be the exact equivalent of the equitable doctrine of "clean hands."

V. THE EXCEPTIONS TO THE EXCLUSIONARY RULE CREATED IN *LEON* AND *KRULL* ARE WHOLLY INAPPLICABLE TO A WARRANTLESS SEARCH IN WHICH THE POLICE THEMSELVES DETERMINE WHETHER THERE IS A LEGAL JUSTIFICATION SUFFICIENT TO UNDERTAKE A SEARCH.

In a last ditch argument, the State suggests that the evidence seized in the unconstitutional search in this case should be admitted under "the good faith exception to the exclusionary rule," citing *United States v. Leon*, 468 U.S. 897 (1984).[37] The fact, of course, is that this Court has never announced any "good faith exception to the exclusionary rule."

It is true that *Leon* has become popularly known as a "good-faith exception" – even among some commentators

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[37] The Amicus Brief of the United States, reflecting a sounder perspective on the inappropriateness of the suggestion, does not join the State's argument. (S.G.Br.13-14 n.6)

who should know better. But this Court obviously took some pains in the *Leon* opinion to avoid that terminology. Indeed, the exception created in *Leon* is explicitly limited to evidence seized in searches conducted pursuant to search warrants that are subsequently found to be constitutionally invalid. 468 U.S. at 922. Likewise, the exception created in *Illinois v. Krull*, 480 U.S. 340 (1987), is explicitly limited to evidence seized in searches conducted pursuant to authority set out in statutes that are subsequently found to be constitutionally invalid. 480 U.S. at 347-55.

The State's brief does parrot language from *Leon* when it asserts that the police in this case "acted in *reasonable, good faith, reliance* on Gail Fischer's apparent authority to permit their entry." (Ill.Br.25) (emphasis added). But this lifting of the "reasonable, good faith, reliance" language from *Leon* is done in total disregard for the logic of the *Leon* rationale.

The justifications for the limited exceptions created in both *Leon* and *Krull* rest on the proposition that the unconstitutionality of the searches in question is primarily, if not solely, the responsibility of judges or legislators who authorized the searches "rather than [the police]." *Leon*, 468 U.S. at 921. In *Leon*, for example, the syllogism for the exception's rationale is that: (1) the exclusionary rule only applies to police violations of the fourth amendment; (2) unconstitutionally-issued search warrants are the fault of the magistrates who issue them "rather than [the police]". Therefore, the exclusionary rule does not apply to evidence seized pursuant to unconstitutionally-issued search warrants. The syllogism in *Krull* is essentially the same. In other words, the Fulcrum on which

both the *Leon* and *Krull* exceptions rest is the common premise that the police are not the primary deciders of whether the kinds of searches under consideration in those cases are constitutionally valid and should be undertaken. In both of those settings, this Court has ruled that the police may rely upon the presumptive validity of the judgment of the magistrate or legislature and, hence, are not required to second guess the judgment of that legal authority.[38]

Given this underlying logic, the terminology of "objectively reasonable reliance [on a magistrate or legislator]" in *Leon* and *Krull* must be read as a term of art that is decidedly *not* equivalent to the general reasonableness standard found in the Fourth Amendment. The police conduct in *Leon* and *Krull* (in both cases, the police conducted a search in the absence of probable cause) *is "reasonable" only in light of the police reliance on the presumptive validity of the decisions of magistrates and legislators*. Indeed, standing alone, the searches in *Leon* and *Krull* could not be viewed as reasonable police conduct in the absence of their reliance on another, presumptively correct, legal decision maker. Thus the term "reasonable reliance" in *Leon* is hardly equivalent to the notion of "reasonableness" found elsewhere in the law. Given *Leon's* underlying logic, and its special use of the term

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[38] Indeed, *Leon* suggests that the police are virtually required to conduct a warrant search once a warrant is issued: "There is nothing more the police may do." 468 U.S. at 921, quoting *Stone v. Powell*, 428 U.S. 465, 498 (1976) (Burger, C.J., concurring) Compare *Massachusetts v. Sheppard*, 468 U.S. 981 (1984)

"reasonable reliance," there is no possible basis for extending the rationale of the exceptions created in *Leon* and *Krull* to situations in which the police are the primary or sole decision makers regarding whether a search should be conducted. *See, United States v. Warner*, 843 F.2d 401, 404-5 (9th Cir. 1988); *United States v. Morgan*, 743 F.2d 1158, 1165 (6th Cir. 1984) *cert. den'd*, 471 U.S. 1061 (1985).

In the instant case, the police cannot be excused from exercising sound judgment on the ground that some other legal decision maker is responsible "rather than" the police. Certainly the State cannot seriously claim that the unconstitutional search that took place here was the fault of Gail Fischer "rather than" the police.[39] As discussed in Section IV, *supra*, the police here did not have any reasonable basis to conclude that valid consent to search had been given, and their decision to search was a careless, if not willful, violation of the reasonableness standard of the Fourth Amendment. No exception to the exclusionary rule is called for in these circumstances.

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[39] Though that is the implication of the State's language: "Here, the police officers acted in reasonable, good faith, *reliance on Gail Fischer's apparent authority* . . . " (Ill.Br.25)

CONCLUSION

Edward Rodriguez, as respondent, respectfully urges that the decision below be affirmed.

Alternatively, the respondent urges that, in light of the independent and adequate state law ground for the rejection of any "apparent authority" doctrine in the Illinois courts, the petition for certiorari be dismissed as improvidently granted, or that the case be remanded to the court below for further proceedings.

Respectfully submitted,

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